The Circuit Court
for the Sixth Judicial Court of Michigan
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MICHAEL WARREN
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August 1, 2005

Mr. Corbin Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: Proposed Amendment of Michigan Rules of Court 8.103
ADM File No. 2004-42

Dear Mr. Davis:

Although I certainly agree with the spirit of the proposed amendment to MCR 8.103, I offer the following observations, comments, suggestions, and inquiries. Because of my relatively unique experience of presiding over three very heavy dockets in less than three years, I hope that my thoughts can be illuminating as the Supreme Court addresses the troublesome area of docket congestion. In short, the current proposed amendment mandating the filing of requests for investigations with the Judicial Tenure Commission is unwise because it (1) is unnecessary, (2) is ill-defined and overbroad, (3) unfairly subjects all judges to a request for investigation by the Judicial Tenure Commission without any particularized finding that an investigation is warranted, and (4) is incompatible with various Rules of Court.

1. **The Proposed Amendment to MCR 8.103 is Unnecessary.**

Judicial Canon 3A.(5) provides that "A judge should dispose promptly of the business of the court." In the event a judge fails to do so, a referral to the Judicial Tenure Commission is currently authorized. Similarly, as noted by Chief Judge Wendy Potts in her separate letter to you, MCR 8.110(C)(3)(a)

vests the Chief Judges of each court with the authority and obligation to supervise caseload management and judicial work. Thus, two mechanisms exist to address judges who are dilatory in completing their tasks or who fail to properly manage their dockets. Those judges who truly require disciplinary action can be readily targeted and addressed under these two processes. The proposed amendment to MCR 8.103 will simply create a redundant and cumulative process that will only serve to overburden the Judicial Tenure Commission. A better approach is to focus on those judges that have violated the canon and to work with the chief judges to improve overall docket management.

2. The Proposed Amendment to MCR 8.103 is Ill-Defined and Overbroad.

The proposed amendment provides that the state court administrator shall file a request for investigation with the Judicial Tenure Commission "against each judge who consistently fails to comply with the caseload management standards . . . ." The text has no definition whatsoever of "consistently fails to comply." Whether this means three months, six months, one year, or more is unclear. Because the standards address the percentage of cases that should be resolved over a certain period of time, presumably any failure to meet the guidelines could be considered a consistent failure to comply. Is the rule intentionally vague? If the ambiguity in the rule is to allow the state court administrator discretion in requesting investigations, can there be any guarantee that that the discretion will be applied consistently? Also, will the definitions change with state court administrators?

Moreover, there appears to be no materiality requirement – i.e., any failure to comply with the caseload standard triggers the request to file an investigation. Stated another way, if a judge's docket is one case over the standard, an investigation must be requested.

The ambiguity and paradoxically strict nature of the rule does not appear to serve justice. Again, the current canon and authority of the chief judges appear as capable of addressing these issues as the proposed amendment.

3. The Proposed Amendment to MCR 8.103 Unfairly Subjects All Judges to a Request for Investigation without Any Particularized Finding that an Investigation is Warranted.

The proposed amendment provides that the state court administrator *shall* file a request for investigation with the Judicial Tenure Commission "against *each* judge who consistently fails to comply with the caseload management standards . . . ." The clear and unambiguous language of this proposed text removes any discretion from the state court administrator in connection with filing such requests. To address the issues of ambiguity raised *supra,* presumably the state court administrator may develop a standardized approach for determining when a judge "consistently fails to comply" with the standards.

When I was first appointed to the bench, I was assigned the heaviest overall general jurisdiction docket on the Court; in my second year, I was assigned the heaviest Family Court docket; and most recently I was assigned to the heaviest civil jurisdiction docket. Although I have been able to manage very significant reductions in each of the dockets (the first docket substantially decreased and materially improved in the rankings, the second docket became the smallest of the full-time dockets in the Family Court, and the third civil docket has been reduced by nearly 20% in approximately 6 months), I presume that a zealous state court administrator, looking solely at the statistics, can determine that these dockets are proof positive of my consistent failure to comply with the caseload management standards.

I highlight my personal experience because it reveals a number of fundamental flaws to the current proposal. First, the current proposal fails to address the learning curve for new judges. Second, the current proposal fails to account for docket transfers (for example, for new judges, or judges between Family Court and general jurisdiction, etc.). Third, the current proposal fails to take into account docket improvements. Even a 20% reduction in 6 months may not create total compliance with case management standards. Fourth, not only does the proposal appear to unfairly punish those who have taken over troublesome dockets, it also appears to unfairly grant a windfall for underperforming judges who leave a neglected docket in favor of a better managed docket from another judge. Fifth, the proposal appears to completely ignore the caseload differentials within and between courts. For example, some circuit and family courts simply have more cases per judge than others. Similarly, some circuit and family courts have more sophisticated and demanding cases. A judge in an overburdened circuit facing several lengthy criminal trials and numerous complex medical malpractice, tort, and commercial cases is held to the same standard as a

judge in another circuit with a lower caseload and a less demanding docket. Likewise, two new judges in the same circuit, one with a less than average caseload and another with the heaviest docket, are both measured by the same standard. Presumably the new judge with the smaller docket could have her docket bloat (but still be under average) and the new judge with the bigger docket could reduce his docket (but still be over average), and the judge improving his docket could be investigated and the other judge lauded. Sixth, judges who accept additional judicial responsibilities without a corresponding docket reduction may become the targets of investigations. For example, in the Oakland County Circuit Court several judges currently preside over very effective drug courts, but these do not result in a reduction of their general dockets – in fact, such courts increase their workload. Likewise, I am the pilot judge for an e-filing project with no reduction in my docket; this project requires not insignificant demands on my time. Fearing that no good deed goes unpunished, the very possible response to the adoption of the proposed amendment is the abandonment of such projects by judges. Seventh, judges who suffer ill health or major life events (e.g., the birth of a child (yes, I have one year old)), are held to the same standard as those who do not.

In short, the broad brush of the proposed amendment fails to account for any individualization of cause for filing a request for an investigation. I have little doubt that there are judges who should be investigated for their failure to properly administer justice in a timely fashion. Justice, however, would best be served by allowing targeted investigations upon individualized findings of improper docket management, not by a one-size-fits-all rule that inappropriately casts a shadow over many who are performing an admirable job.

4. The Proposed Amendment to MCR 8.103 is Incompatible with Various Rules of Court.

Michigan's desire for the efficient and speedy administration of justice has an inherent tension with the fairness of decision-making. Although I abhor adjournments and other postponements of scheduling order dates and trials, Michigan jurisprudence (at least some Court of Appeals jurisprudence) all but encourages, if not mandates, certain delays.

For example, some unpublished (and a published, albeit reversed on other grounds) Court of Appeals cases hold that certain motions for summary disposition must be heard "at any time" – regardless of the scheduling orders of the trial court. Although I find these cases to be *quite* unpersuasive, out of

an abundance of caution some trial courts feel bound to follow them, and some Court of Appeals panels may very well continue to hold that untimely motions must heard and reverse trial courts that enforce their scheduling orders. These decisions all but completely eviscerate the ability of the trial court to manage the docket since motions for summary disposition are often filed (and struck in my Court) on the eve of trial.

Similarly, MCR 2.118 and Michigan jurisprudence requires that amendments to pleadings be granted liberally - this often requires extension of discovery, case evaluation, and trial. Likewise, under MCR 2.401(G) and corresponding published Court of the Appeals cases, dismissing a case or finding a party in default for failing to appear for a pretrial is very difficult, thereby again causing delays manufactured by counsel. That a decision to strike a witness who is not listed on a witness list will be affirmed is also a question mark because of Court of Appeals cases requiring the trial court to conduct a lengthy balancing test not set forth in the applicable Rule of Court, thereby engendering further delays for additional depositions and other discovery. Delayed joinder, notices of nonparty fault, and consolidation also result in significant delays sanctioned, if not encouraged, by the Rules of Court. Circuit courts are also required to try cases which clearly have less than a $25,000 value at the time of trial, but no remand rule exists, even if a case evaluation has been returned with no or minimal value.

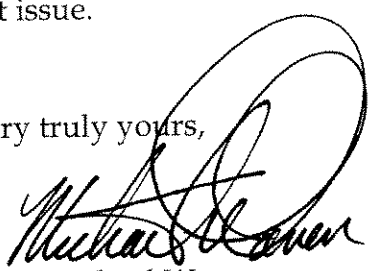
In the criminal context, defendants routinely demand to fire their first and second (and third, etc.) counsel on the day of trial, putting the Court in the unenviable position of forcing the defendant to go to trial with counsel despite the defendant's claim of a breakdown of the attorney client relationship (thereby possibly depriving the defendant of a fair trial and risking reversal), or adjourning trial significantly to appoint a new lawyer (having the defendant defend himself has been the basis of reversals in several unpublished cases). Another serious issue delaying the adjudication of criminal matters is the very slow processing of DNA samples at the State Crime Lab - often causing delays of months at the request of both the people and the defendant. Other issues abound.

Significant revisions to the foregoing Rules of Court strengthening the ability of the trial court to enforce scheduling orders and otherwise manage their docket should be prerequisites to implementing the proposed amendment to MCR 8.103. Otherwise judges will be placed into a nearly impossible triangulation of tension: (1) faithful adherence to the Rules of Court and precedent that encourage, if not mandate, delay and adjournment, (2) attempts to properly manage the docket by adhering to the case management standards, and (3) fears of automatic requests for investigation

to the Judicial Tenure Commission for not adhering to the management standards.

Thank you in advance for your time, I hope my comments have provided some insight on how to proceed with this very difficult and important issue.

Very truly yours,



Hon. Michael Warren